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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-2266

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY, RON ASHCROFT, SAN JUAN COUNTY TREASURER,
Plaintiffs/Appellees,

v.

LIBERTY GROUP, A California Limited Partnership; NORMAN ANDREW GURLEY;
Defendants-Appellants,

and

LIBERTY PARTNERS, INC., A California Corporation; F.M.G. PARTNERS, A California General Partnership; LIBERTY CAPITAL MARKETS, INC., A California Corporation; CHESTER ARTHUR WALKER, JR.; DOYLE LAVERNE HOLMES; ROBERT CLAYTON HOLMES; STEVE RAY HOLMES, *Defendants.*

No. 90-2275

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY, RON ASHCROFT, SAN JUAN COUNTY TREASURER,
Plaintiffs/Appellees,

v.

LIBERTY GROUP, A California Limited Partnership; NORMAN ANDREW GURLEY; LIBERTY PARTNERS, INC., A California Corporation; F.M.G. PARTNERS, A California General Partnership; CHESTER ARTHUR WALKER, JR.; DOYLE LAVERNE HOLMES; ROBERT CLAYTON HOLMES; STEVE RAY HOLMES,

and *Defendants,*

LIBERTY CAPITAL MARKETS, INC., a California Corporation,
Defendant-Appellant.

No. 91-2166

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY, RON ASHCROFT, SAN JUAN COUNTY TREASURER,
Plaintiffs-Appellants,

v.

LIBERTY GROUP, A California Limited Partnership; LIBERTY CAPITAL MARKETS, INC., A California Coporation,
Defendants-Appellees,

and

PRUDENTIAL-BACHE SECURITIES, INC., A Delaware Corporation,
Garnishee-Appellee.

Appeal from the United States District Court for the District of New Mexico

(D.C. No. 88-414-M)

(Filed May 28, 1992)

Submitted on the briefs:

Don A. Proudfoot, Jr. of Graham & James, Los Angeles, CA (Alexis H. Johnson of Sutin, Thayer & Browne, Albuquerque, NM, with him on the brief), for Appellants Liberty Group, Liberty Capital Markets, Inc. and Norman Gurley.

James O. Browning (Raul A. Carrillo, Jr. with him on the brief), of Browning, Peifer & Wishner, P.A., Albuquerque, NM for Garnishee-Appellee Prudential-Bache Securities, Inc.

James L. Dow of the Dow Law Office, P.A., Carlsbad, NM (B.J. Baggett, Aztec, NM, with him on the brief), for Appellee San Juan County.

Before HOLLOWAY and MCWILLIAMS, Circuit Judges, and CAUTHRON,* District Judge.

HOLLOWAY, Circuit Judge.

This appeal arises from an action instituted by the plaintiff-appellee County of San Juan, State of New Mexico to recover damages it claims it sustained in securities transactions with the appellant Liberty Group. The County alleged violations of a number of federal securities laws and of RICO. After a jury returned a verdict against the defendants they moved for a new trial on the federal securities claim and for JNOV or a new trial on the RICO claim. These motions were denied. An appeal was taken to this court. Meanwhile cross motions to amend the judgment were made. The district court granted both motions, and Liberty Capital, the successor in interest to Liberty Group, appealed the grant of the County's motion. While this second appeal was pending, a writ of garnishment was issued to one of Liberty Capital's debtors. Liberty Capital moved to have the writ quashed. The district court quashed the writ and the County commenced the third appeal. The three appeals are consolidated here and will be disposed of by this opinion.

I

In 1985 San Juan County, New Mexico adopted a new investment policy which provided that a portion of its funds was to be invested in various government backed securities. The County used a number of different brokers for these investments. Liberty Group was the County's broker for thirteen such transactions, with Norman Gurley (Gurley) acting as the Liberty Group account executive in charge of the County's transactions. On

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* The Honorable Robin J. Cauthron, United States District Judge for the Western District of Oklahoma, sitting by designation.

these transactions Liberty Group charged the County a markup over the price Liberty Group had paid for the bonds. The County was never informed of these markups, which it maintains were as high as 40%.

After the markups were discovered by the State Auditor, the County brought suit. The second amended complaint, upon which the trial was held, named Liberty Group; its general partners, Liberty Partners and F.M.G. Partners; Liberty Capital Markets, the successor in interest to Liberty Group; Norman Gurley; and Doyle Holmes, the President of Liberty Capital, as defendants.[1] The County sought damages for violations of SEC Rule 10b-5 and the Racketeer Influenced and Corrupt Organization Act (RICO). 18 U.S.C. §1982(c). The jury found that Norman Gurley, Doyle Holmes, and Liberty Group had violated 10b-5 and that Gurley and Liberty Group had violated RICO. Damages were assessed at $188,223. On the basis of separate motions by the County and Doyle Holmes, the trial court amended the judgment to treble the damages as provided by RICO and granted judgment non obstante veredicto in Holmes' favor.

The County and Liberty Capital Markets (Liberty Capital) then filed cross motions to alter or amend the judgment. The County sought to have the judgment reflect the parties' pretrial stipulations that Liberty Capital Markets was the successor in interest to Liberty Group and that when Liberty Capital succeeded to Liberty Group's registration as a broker-dealer it had

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[1] Prudential-Bache Securities was originally named as a defendant but the claim against it was dropped shortly before trial. Also named were Chester Walker, a general partner of Liberty Group; Robert Holmes, President of Liberty Partners; Steve Holmes, President of Liberty Capital; and James Graham, Secretary of Liberty Partners. The County's claims against Graham were dismissed without prejudice before trial. At the close of evidence, a directed verdict was entered in favor of Robert and Steve Holmes and Chester Walker.

filed a form with the State of New Mexico announcing that it was assuming all of Liberty Group's assets and liabilities. Liberty Capital moved to have the judgment reflect the verdict that it was not liable for any wrongdoing of its own and to have those counts not submitted to the jury dismissed with prejudice. The trial judge granted *both* motions and entered a corresponding amended judgment.

Gurley and Liberty Group timely brought the first of these appeals, No. 90-2266, from the denial of their new trial and JNOV motions. They argue that the district court erroneously instructed the jury on the requisite state of mind for a 10b-5 violation and that there was insufficient evidence to support the finding of a RICO enterprise. Liberty Capital appealed the amended judgment on December 13, 1990, commencing appeal No. 90-2275. Liberty Capital's principal claim is that the jury verdict did not find it liable as Liberty Group's successor and that the amended judgment should be changed to omit any reference to Liberty Capital as Liberty Group's successor in interest.

After entry of the amended judgment and the consequent appeals to this court, the County sought to execute what it claimed to be a judgment against Liberty Capital as Liberty Group's successor in interest. A writ of garnishment was issued naming Prudential-Bache Securities Inc. (Prudential-Bache) as garnishee. Prudential-Bache held notes in Liberty Capital's account to cover Liberty Capital's trading obligations. Liberty Capital filed a motion to quash the writ. The trial court denied the motion to quash. Liberty Capital then filed a motion seeking to have the court clarify and reconsider its denial of the motion to quash.

On June 17, 1991 the district court issued a memorandum opinion and order in which it quashed the writ.

It held that the propriety of the writ turned on whether Liberty Capital was liable by virtue of successor liability for the judgment against Liberty Group. Since the jury had not reached the issue, the district court opined that it could appropriately determine that question itself. It held that since the matter had not been litigated and since there is no vicarious RICO liability, Liberty Capital could not be named a judgment debtor. The writ was accordingly quashed. The County appealed this decision in Appeal No. 91-2166, which forms the third appeal consolidated here. The County argues that the district court was without jurisdiction to alter the judgment once the case was on appeal.

II

Liberty Group and Gurley make two primary arguments to this court in No. 90-2266. They argue that the district court gave an erroneous instruction to the jury which allowed the jury to find a violation of Rule 10b-5 based no negligent failure to disclose when the proper standard, Liberty Group and Gurley maintain, is a reckless failure to disclose. They seek a new trial on this count. Secondly, they seek a JNOV or a new trial on the RICO charge because they claim that there was no evidence introduced that showed an enterprise separate from the defendant Liberty Group, and with its own purpose, structure, and decision-making capability as required by 18 U.S.C. 1962(c).

Rule 10b-5 promulgated under the Securities and Exchange Act of 1934 makes it unlawful

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the

circumstances under which they are made, not misleading, or

(c) to engage in any act, practice, or course of business which would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5(b).

The basis of the County's claim against the defendants is that Liberty Group churned the County's account by making frequent trades and charging markups on the transactions which were both excessive and undisclosed. The parties have agreed that the markups were undisclosed. Appellant's Brief at 10. The central issue at trial was thus whether the markups were so excessive that the failure to disclose them constituted fraud of the sort prohibited by Rule 10b-5. The parties accordingly marshalled experts who gave contradictory testimony as to the reasonableness of the markups. Tr., Appellant's Appendix at 377 and 384-87.

After the close of the evidence the court instructed the jury as to the law. Instruction 24, which is challenged here, described the requisite mental state for liability on a 10b-5 claim.

The plaintiff, in order to recover on his 10B-5 claim, must show that the defendant acted knowingly, that is, with a mental state embracing intent to deceive, manipulate, or defraud. In order to establish this element the plaintiff must prove by the greater weight of the evidence that the defendant made material statements which he knew to be false, or made statements with reckless disregard for their truth or falsity, *or knew of the existence of material facts which were not disclosed and he should have realized their significance in the making of an investment decision*, or knew of the existence of material facts

> which were not disclosed although he knew that knowledge of those facts would be necessary to make his other statements not misleading.

Joint Appendix at 274 (emphasis added).

The defendants objected that this instruction was an incorrect statement of the law. They asserted that "[t]he scienter element requires an intent to deceive, manipulate, or defraud. I think that under the [*Hochfelder*] case that you would have to show more than this, which would be more of a simplest [sic] negligence standard instead of a gross negligence standard." Tr., Joint App. at 77-78. The objection was overruled.

On appeal the appellants elaborate on their initial objection by arguing that *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, *reh'g denied*, 425 U.S. 986 (1976), established that 10b-5 liability requires much more than mere negligence. This reading is correct. *Id.* at 193. Although *Hochfelder* established the principle that scienter is required to generate 10b-5 liability, it expressly declined to decide whether recklessness is sufficient to constitute scienter. *Id.* at 194 n. 12. This Circuit has since answered the question in the affirmative. *Hackbart v. Holmes*, 675 F.2d 1114, 1117 (10th Cir. 1982) ("At this time we expressly hold that recklessness satisfies the scienter requirement.") The County cites contrary authority for the proposition that Rule 10b-5 is violated whenever facts material to an investment decision are intentionally withheld. *Tager v. S.E.C.*, 344 F.2d 5, 8 (2d Cir. 1965); *Charles Hughes & Co. v. S.E.C.*, 139 F.2d 434, 435 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944). The County's precedents are largely inapposite, however, and all predate the Supreme Court's ruling in *Hochfelder* and our holding in *Hackbart*. Reviewing the instructions as a whole, we hold that the trial court's instruction that allowed a finding of fault based on the simple negligence

standard of "should have realized" was therefore error as a matter of law.[2]

The County argues, however, that even if the instructions were in error, Liberty Group did not make a proper objection to the instruction as required by Fed. R. Civ. P. Rule 51. The County points out, correctly, that the defendants at trial asserted that the proper standard was one of gross negligence and not the recklessness standard which they now propose. The County, echoing the district court's reasoning denying the defendants' new trial motion, argues that the defendants may not now raise this objection absent plain error. We disagree because we find that a proper and timely objection was made.

Liberty Group identified the specific instruction to which they objected. They stated the general grounds for the objection—that 10b-5's scienter requirement demands a showing of a higher quantum of culpability than that entailed in simple negligence. Furthermore, they cited the specific Supreme Court case which established this proposition. The only possible mistake made by Liberty Group was that they requested an instruction on gross negligence and not the presumably somewhat more stringent recklessness standard. Yet the line between gross negligence and recklessness is a fine one at best. "[T]here is often no clear distinction at all between [recklessness] and 'gross' negligence, and the two have tended to merge and take on the same meaning." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, p. 214 (1984).

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[2] On remand the district court should take care to incorporate into its instructions the essence of the definition of scienter outlined in the relevant cases. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Hochfelder*, 425 U.S. at 193. This intent requirement can be satisfied by a showing of recklessness. Reckless behavior is conduct that is "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or so obvious that the actor must have been aware of it." *Hackbart*, 675 F.2d at 1118.

See Britt v. Allen County Community Junior College, 638 P.2d 914, 920 (Kan. 1982) (equating gross negligence with reckless disregard for consequences); *Fassett v. Santiam Loggers, Inc.*, 517 P.2d 1059, 1060 (Or. 1973) ("Gross negligence is the equivalent of reckless disregard."); *St. Onge v. Detroit and Mackinac Railway Co.*, 321 N.W.2d 865, 867 (Mich. 1982) (holding that gross negligence "has essentially the same meaning as the term 'recklessness'").

"[I]f the objection properly calls the alleged error to the court's attention and relates to the court that an exception is taken to the instruction, the requirement of [Rule 51] is met." *Taylor v. Denver and Rio Grande Western Railroad Co.*, 438 F.2d 351, 353 (10th Cir. 1971). Without in any way implying that gross negligence and reckless conduct are legally synonymous, we hold that under the circumstances the defendants' reference to gross negligence was sufficient to alert the district court to the issue of the degree of culpability necessary to constitute scienter. The defendants' objection that *Hochfelder* requires a finding of gross negligence rather than simple negligence was sufficient to fully inform the court of the specific nature of and grounds for the objection. The objection was thus sufficiently preserved on appeal.

Given that the defendants timely objection to the state of mind instruction and that the challenged instruction was erroneous, there remains only the question of whether or not the error was prejudicial. When a timely, well-taken objection is made to jury instructions, the beneficiary of the error, in this case the County, has the burden of showing that the error "almost surely did not affect the outcome of the case." *Lusby v. T.G.&Y. Stores, Inc.*, 796 F.2d 1307, 1312 n.4 (10th Cir. 1986), *cert. denied*, 479 U.S. 884 (1986).[3] The focus of the trial

[3] The appellees would have us apply the standard used in *Clegg v. Conk*, 507 F.2d 1351 (10th Cir. 1974), *cert. denied*, 422 U.S. 1007

was on the failure to disclose. Answer Brief at 15. The County made no real attempt to show affirmative misrepresentations. The defendants' liability thus turned almost entirely on just how culpable their failure to disclose was. Based on our review of the briefs and of the record as a whole it is clear that the appellees have not met their burden of showing that the trial court's instruction allowing a finding of liability based on simple negligence rather than recklessness was harmless. The judgment of the trial court as to 10b-5 liability must accordingly be reversed and a new trial ordered.

III

The second claim of error of Liberty Group is that there was a failure of proof of an element necessary to establish a violation of RICO. We review de novo the district court's denial of the motion for judgment notwithstanding the verdict. *Johnsen v. Independent School District No. 3*, 891 F.2d 1485, 1489 (10th Cir. 1989). We therefore apply the same standard as applied by the trial court. The denial of a motion for a JNOV will be overtunred only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion. *Ralston Development Corp. v. United States*, 937 F.2d 510, 512 (10th Cir. 1991).

18 U.S.C. § 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

(1975). In *Clegg* this Court refused, in circumstances generally similar to those now before us, to order a new trial absent a showing of fundamental error. *Id.* at 1363. However, in *Clegg*, there had been no proper objection to the challenged instruction at trial. Here there was such an objection.

As the jury instructions and the predominant view in the cases make clear, under § 1962(c) it is required that the "person" and the "enterprise" engaged in racketeering activities be different entities. *See Garbade v. Great Divide Mining and Milling Corp.*, 831 F.2d 212, 213 (10th Cir. 1987).[4] The district court took the position that the verdict against Liberty Group was supported by the evidence that Liberty Group itself was the enterprise. Memorandum Opinion and Order at 7-8. We are persuaded that this was error under the cases cited. The language of the statute clearly contemplates that the "person" charged will be distinct from the "enterprise", since a person cannot logically be "employed by or associated with" himself. If Liberty Group is found to have violated RICO, liability under § 1962(c) must be based on Liberty Group's association with some entity separate from itself. The County thus had the burden of proving that these defendants were part of an enterprise which had an existence and purpose distinct from any one of them to establish § 1962(c) liability.

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[4] Eleven circuits have addressed this issue, and all but one have found that the RICO "enterprise" and the "person" must be distinct. *See Yellow Bus Lines v. Local Union 639*, 839 F.2d 782, 789-90 (D.C. Cir. 1988), *rev'd on other grounds*, 913 F.2d 948 (D.C. Cir. 1990) (en banc); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396 (9th Cir. 1986); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 123 (5th Cir. 1986); *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 30 (1st Cir. 1986); *Horoco v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 401 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633 (3d Cir. 1984); *Alexander Grant & Co. v. Tiffany Industries*, 742 F.2d 408, 411 n.6 (8th Cir. 1984), *judgment vacated on other grounds*, 469 U.S. 1205 (1984); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). *Cf. United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). For a discussion of the evolution of this doctrine see David Smith and Terrance Reed, *Civil RICO*, ¶ 3.07 (1992).

The County identifies the RICO enterprise as an association in fact among Liberty Group, Liberty Partners, F.M.G. Partners, Liberty Capital Markets, Norman Gurley, and Doyle Holmes. This was how the case was submitted to the jury. Instruction No. 12, Joint App. at 260. The defendants counter that the alleged association in fact was nothing more than Liberty Group itself. In their view the evidence which purportedly showed an association in fact showed nothing more than the various officers and employees of Liberty Group carrying on the firm's business. Under *Old Time Enterprises v. International Coffee Corp.*, 862 F.2d 1213 (5th Cir. 1989), a separate enterprise is not demonstrated by the mere showing that the corporation committed a pattern of predicate acts in the conduct of its own business. *Id.* at 1217. Thus, the defendants maintain, there was a total failure of proof of an enterprise separate from the defendant, Liberty Group. After a close examination of the record we must agree.

In its answer brief the County gives a careful description of how the alleged association in fact carried out its business, relying heavily on the testimony of Doyle Holmes. Answer Brief at 21-23. It was Holmes' testimony at trial which laid out the operating procedures of the enterprise's securities business. Despite the County's claims, at no point did Holmes describe activity by any enterprise other than Liberty Group itself. The "association's" business in New Mexico began with the receipt of a license to act as a broker-dealer in the state. Second Amended Complaint, Appellee's App. at 4. Liberty Group's statement that it would not maintain an office in the state was signed by James Graham in his capacity as secretary of defendant Liberty Partners, a general partner of Liberty Group. Tr., Appellee's App. at 201. The account executives who were licensed to operate in New Mexico were Jim Culhane and the defendant Norman Gurley, employees of Liberty Group. *Id.* at 202.

It was Norman Gurley who handled the San Juan account.

A bond transaction would begin after a conversation between an account executive and his client ended in the determination that a particular security should be bought or sold. The account executive would then notify the trading desk, usually the defendant Chester Walker, a general partner of Liberty Group. *Id.* at 204. Second Amended Complaint at 3. Calls were then made to clearinghouse brokers such as Prudential-Bache seeking quotes. If the price quoted was acceptable the transaction would be made. Tr., Appellee's App. at 204-205. Prudential-Bache would record these transactions in Liberty Groups' house account, and send a monthly statement to the client. Tr. at 78-79. Plaintiff's Exh. 31-A. The decision on how much of a mark-up to charge clients was made by George Gabel, compliance officer and sales manager of Liberty Group. Tr., Appellee's App. at 82-83.

Every individual involved in setting up the business in New Mexico, trading securities, and determining markups was thus an employee or officer of Liberty Group itself. The license to do business and the trading accounts with Prudential-Bache were both in Liberty Group's name. Although there was some testimony that "Liberty" took one action or another, this was always in a context which made it clear that the entity referred to was Liberty Group and not some amorphous association in fact.

In short, the appellees point to no evidence that the alleged association and its activities were anything more than Liberty Group going about its ordinary business of dealing in securities by and through its officers and employees. A legal entity, such as Liberty Group Ltd., can perform an action or make a decision only through human intermediaries, such as the individual defendants here. Courts have accordingly found that the officers and employees of an organization cannot, in the ordinary course

of their duties, constitute an association in fact separate from the organization itself. *Yellow Bus Lines Inc. v. Local Union 639*, 883 F.2d 132, 141 (D.C. Cir. 1989), *cert. denied*, 111 S.Ct. 2839 (1991); *Moffatt Enterprises, Inc. v. Borden, Inc.*, 763 F. Supp. 143, 149 (W.D. Pa. 1990). Thus there was a complete failure of proof at trial of an association in fact separate from Liberty Group. The required separation between the RICO enterprise and the defendant Liberty Group was not established and JNOV should have been granted to Liberty Group as to any liability under § 1962(c).

With respect to the defendant Gurley, he may be a "person" under § 1962(c). Thus the defect in proving the existence of a "person" separate from the "enterprise" is not present with respect to Gurley, and a new trial for such defect is not required. Nevertheless, the verdict against him must be set aside for the error discussed earlier with respect to the instruction on the underlying securities fraud claim which premised the RICO judgment against Gurley.

IV

In sum, the district court erred in instructing the jury concerning 10b-5 liability. Therefore, new trials must be granted with respect to the federal securities claims of the plaintiffs against both Liberty Group and Norman Gurley.

With respect to the RICO claim against defendants Liberty Group and Liberty Capital, the judgment and amended judgment are being set aside for insufficiency of the evidence as explained above. In the event of such a reversal of the judgment, the appellate court may determine that the appellee is entitled to a new trial, or it may direct that the trial court determine whether a new trial should be granted. Fed. R. Civ. P. 50(d); *Neely v. Eby Construction Co.*, 386 U.S. 317, 329 (1967); *Firestone Tire and Rubber Co. v. Pearson*, 769 F.2d 1471,

1480 (10th Cir. 1985). We conclude that we should leave the determination of whether a new trial should be had on the RICO claim against the defendants to the district court.

Accordingly, in No. 90-2266, the judgment and amended judgment entered in No. 88-414-M of the district court, including the award of attorney's fees and costs, are REVERSED and the case is REMANDED for a new trial for the defendants on the securities claim. In No. 90-2266, San Juan County's request for attorney's fees on appeal is DENIED. With respect to the RICO claim of San Juan County against the defendants, the cause is REMANDED to the district court to determine whether a new trial on the RICO claim should be granted.

Our reversals of the judgment and the amended judgment in No. 88-414-M of the district court make it unnecessary for us to consider the merits of the claims of error in No. 90-2275 respecting the inclusion in the amended judgment of the pretrial stipulations as to successor liability of Liberty Capital. Both Liberty Capital's request that the amended judgment be partially vacated and San Juan County's request for sanctions and attorney's fees are therefore DENIED.

Furthermore, in connection with No. 91-2166, in light of the reversals of the judgment and amended judgment entered in No. 88-414-M of the district court, it is unnecessary for us to consider the claims of error in the order quashing the writ. The findings concerning the garnishment writ are VACATED as moot. In No. 91-2166, the request of San Juan County for attorney's fees and costs is DENIED.

IT IS SO ORDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 88-414-M Civil

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY, and THE SAN JUAN COUNTY TREASURER,
Plaintiffs,

v.

LIBERTY GROUP, a California Limited Partnership, *et al.*,
Defendants.

Memorandum Opinion and Order
Judge E. L. Mechem
Senior United States District Judge

(Filed November 1, 1990)

MEMORANDUM OPINION AND ORDER

This matter came on for consideration on the following post-trial motions filed by the parties: (1) plaintiffs' and defendants' cross-motions to amend the judgment; (2) defendants' motion for a new trial on the 10b-5 counts on behalf of Doyle Holmes, Norman Gurley, and Liberty Group; (3) defendants' motion for a judgment notwithstanding the verdict (JNOV) or in the alternative for a new trial on the RICO count on behalf of Norman Gurley and Liberty Group; and (4) defendant Doyle

Holmes' motion for JNOV or in the alternative for a new trial. Having considered the motions and responses, and being otherwise fully advised in the premises, I find that the defendants' motion for a new trial on the 10b-5 counts is not well taken and it is denied. Defendants' motion for JNOV or new trial on the RICO count is not well taken and it is also denied. Defendant Doyle Holmes' motion for a JNOV is well taken and it will be granted. Plaintiffs' and defendants' cross-motions to amend the judgment are each well taken. The judgment will, therefore, be amended accordingly.

Background

The Board of County Commissioners of San Juan County brought this suit against Liberty Group, Liberty Partners, Inc., F.M.G. Partners, Liberty Capital Markets, Prudential-Bache Securities, Inc., Chester A. Walker, Doyle Holmes, Robert Holmes, Steve Holmes, James Graham, and Norman Gurley, The County alleged a variety of state and federal fraud charges, violations of the Federal RICO Act, breach of implied contract, and breach of fiduciary duty. Mr. Ron Ashcroft, the County Treasurer at the time of the transactions in question, was originally named as a plaintiff. However, Mr. Ashcroft was not named in the Second Amended Complaint and at the outset of the trial the parties agreed that Mr. Ashcroft was no longer a plaintiff. By my order of September 25, 1989, defendant Prudential-Bache was dismissed as were plaintiffs' claims for mail and wire fraud. Plaintiffs' claims against defendant James Graham were dismissed without prejudice pursuant to a stipulated order on August 3, 1990. A trial of the remaining parties and claims was held before a jury on August 20 through 23, 1990. At the conclusion of defendants' evidence, I directed a verdict in favor of defendants Robert Holmes, Steve Holmes, and Chester Walker. The judgment in favor of these three defendants is not at issue. Defendants' motion for a directed verdict in favor of Doyle Holmes on all counts was denied.

At the outset of the trial, the following stipulated facts were read to the jury:

> These are the uncontroverted facts that the parties have agreed to. They are in the form of stipulations and you should regard these facts as having been proved.
>
> . . . .
>
> Liberty Group (Liberty) was a California limited partnership, since dissolved. Liberty Partners, Inc. (Liberty Partners) is a California corporation. F.M.G. Partners is a California general partnership consisting of Liberty Partners and, at the time of the events of this case, Chester Arthur Walker, Jr., general partner of F.M.G. [Partners, and] Liberty Capital Markets, Inc. [Liberty Capital].
>
> . . . .
>
> The following named defendants held the following positions with Liberty, Liberty Partners, Liberty Capital, and F.M.G.
>
> Chester Arthur, Jr. was a shopper for Liberty, a general partner of F.M.G., a partner in Liberty Partners.
>
> Doyle Laverne Holmes, Secretary of Liberty Partners, and President and Chief Executive Officer of Liberty Capital.
>
> Robert Clayton Holmes, President of Liberty Partners and Director of Liberty Capital.
>
> Steve Ray Holmes, Secretary of Liberty Capital.
>
> James Arthur Graham, Secretary and Treasurer of Liberty Partners and Director of Liberty Capital.
>
> Norman Andrew Gurley, an account executive of Liberty handling the San Juan County Brokerage Account No. 950844.

> Defendant Liberty Capital was a member of the National Association of Securities Dealers. From on or about June of 1986 to on or about January of 1987, Liberty Group acted as a broker and/or dealer for the County of San Juan in the transactions described herein.
>
> Defendant Liberty Capital is a California corporation which is the successor in interest to Liberty. On or about January 12, 1988, Liberty Capital filed an amended form BD with the New Mexico Securities Division stating that it was succeeding in the registration of Liberty as a broker/dealer and had assumed all assets and liabilities of Liberty.
>
> It is a member of the NASD, National Association of Securities Dealers, and was registered as a broker/dealer under the provisions of the New Mexico Securities Act.
>
> The defendant Norman Andrew Gurley is a resident of the State of California and was at all times material to the complaint employed as an account executive for Liberty.
>
> . . . .
>
> Liberty and Liberty Capital Markets operated at all times material as a broker/dealer and had entered into a clearing broker relationship with Prudential. Prudential was thereby acting as the clearing broker for Liberty and Liberty Capital Markets during all times material to this complaint on a fully disclosed basis.

During trial, plaintiffs chose only to pursue the claims of securities fraud in violation of Rule 10b-5 of the Securities Exchange Act and the Securities Exchange Commission and the Federal RICO claim. No jury instructions were offered or given on plaintiffs' remaining claims or on the theory of successor liability. The only theories of

liability that the jury was instructed on, and which were addressed by the special verdict, were the violation of Rule 10b-5 of the Securities Exchange Commission in transactions with San Juan County and violation of Section 1962(c) of the Federal RICO statute.

The jury found that defendants Liberty Group, Norman Gurley, and Doyle Holmes violated Rule 10b-5 and that defendants Liberty Group and Norman Gurley violated the RICO statute. The jury also found that as a result of these violations, San Juan County suffered damages in the amount of $188,223.09. A judgment on the jury verdict was entered by the Clerk of the Court on August 28, 1990.

Discussion

A. *Judgment Notwithstanding the Verdict*

In determining whether to grant a motion for JNOV, as for a directed verdict, the issue to determine is the sufficiency of the evidence. It is the law of this Circuit that the required strength of the evidence to permit a JNOV is governed by federal law. *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 612 (10th Cir. 1984). Under the federal standard, a JNOV is "appropriate only when the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made." *EEOC v. Prudential Federal Savings & Loan Ass'n*, 736 F.2d 1166, 1171 (10th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985) quoting *Symons v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1974). In determining whether to grant a motion for JNOV, I may not weigh the evidence, weigh the credibility of the witnesses, or substitute my judgment for that of the jury. *Id.* Furthermore, I must view the evidence most favorably to the plaintiffs and give the plaintiffs the benefit of all reasonable inferences. *Id.*

Applying these standards to this case, I find that defendants' motion for JNOV on the RICO claims must be

denied. I note as a preliminary matter that in its motion and responses to defendants' various motions plaintiffs submitted exhibits and evidence that were not admitted at trial. My decisions, however, are based solely on evidence that was admitted at trial. The remainder of the material supplied by plaintiffs was not taken into consideration. Defendants argue that no evidence of an association-in-fact enterprise or pattern of racketeering activity was introduced as required under RICO. However, there was ample evidence presented at trial from which a jury could have reasonably found that both an enterprise and pattern of racketeering activity existed.

The RICO statute defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity . . . ." 18 U.S.C. Section 1961(4). An enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit . . . . [I]t is an entity separate and apart from the pattern of activity in which it engages." *U.S. v. Turkette*, 452 U.S. 576, 583 (1980).

The stipulated facts that were read to the jury, which the jury was instructed to regard as priven, support the conclusion that Liberty Group was an enterprise that existed as a legitimate business entity engaged as a broker/dealer for the sale of securities separate and apart from the transactions in question. In addition, plaintiffs' exhibits Nos. 32 and 33 (documents addressed to the New Mexico Department of Regulation and Licensing, Securities Division regarding Liberty Group), indicate that Liberty Group conducted business in New Mexico. This evidence is sufficient to support a reasonable inference that an "enterprise" existed for purposes of plaintiffs' RICO claim.

To prove a pattern of racketeering activity under RICO, a plaintiff must show at least two racketeering predicate acts that are related and that amount to, or threaten, the likelihood of continued criminal activity.

H.J., Inc. v. Northwest Bell Telephone Co., 57 L.W. 4951 (1989). It is not necessary to show that the acts were in the furtherance of multiple schemes. *Id.* The plaintiffs presented evidence of thirteen separate transactions between the County and Liberty Group through its agent, Norman Gurley, from June 1986 through January 1987. Plaintiffs claimed that the transactions constituted violations of Rule 10b-5 in order to find a pattern of racketeering activity under RICO. There was disputed, but ample, evidence for the jury to so find.

Plaintiffs' and defendants' experts both testified at length about the transactions in question. Plaintiffs' expert testified about how and why the transactions involved multiple excessive markups and failures to disclose material facts to the County in the sale of securities. Though defendants' expert contradicted plaintiffs' expert, it was for the jury to reconcile the difference.

Turning to defendant Doyle Holmes' motion for a JNOV on the Rule 10b-5 claim, I find that defendant's argument is well taken. As defendant correctly points out, liability for a 10b-5 sale of a security. *Williams v. Sinclair*, 529 F.2d 1383, 1389 and fn.10 (9th Cir. 1975); *Seattle-First Nat'l Bank v. Carlstedt*, 678 F.Supp. 1543 (W.D.Ok. 1987). All of the evidence presented showed that Doyle Holmes held no position with Liberty Group and was not involved with the transactions between Liberty Group and San Juan County. All of Doyle Holmes' conduct that plaintiffs complain of occurred during or after 1988, long after the purchase/sale of securities to San Juan County. Because all of the evidence presented "points but one way" and cannot support any reasonable inference to sustain plaintiffs' position, JNOV is appropriate and will be granted.

Defendant Holmes alternatively moves for a new trial for the reasons set out in the new trial motion filed on behalf of Liberty Group, Norman Gurley, and Doyle Holmes. When such an alternative motion is made, it is

essential that I rule on both the JNOV and the new trial motions. *See Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); *Bailey v. Slentz*, 189 F.2d 406, 407 (10th Cir. 1951).

B. *New Trial*

Defendants Holmes, Gurley and Liberty Group move for a new trial on the 10b-5 counts claiming that the verdict was against the clear weight of the evidence, because damages were excessive as a result of passion and prejudice of the jury, because the court erred in permitting a jury trial, and because the court erred in its instruction to the jury on the issue of scienter.

If a court determines that a verdict was the result of passion or prejudice, or for any other reason it appears that the jury erred or abused its discretion on the issues of liability and damages, the court must order a new trial. *Malandris v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981).

1. *Weight of the Evidence*

As already discussed, the jury verdict against Doyle Holmes' on the 10b-5 counts was clearly against the weight of the evidence. No evidence was presented linking him to the purchase or sale of the securities in question. Therefore, defendant Holmes' motion for a new trial will be granted, but only in the event that the judgment entered in favor of defendant Holmes on his motion for JNOV is reversed or set aside on appeal. *Bailey v. Slentz*, *supra* at 407.

Regarding defendants Liberty Group and Norman Gurley, the jury heard sufficient evidence to find liability on the 10b-5 counts. Though the evidence was disputed and contradictory evidence was also presented, the jury heard explanations about how the transactions were carried out, how the markups were calculated and found to be excessive, and that neither defendant Gurley or

Liberty Group ever advised the county treasurer of the excessive markups. The standard required for a new trial is less than that for JNOV. To grant a new trial, I must find that the jury verdict was against the weight of the evidence. *Brown v. McGraw-Edison Co., supra.* However, this does not mean that I can substitute my judgment for that of the jury. It must be clear that an erroneous result was reached, *Frank v. Bloom*, 634 F.2d 1245, 1254 (10th Cir. 1980), and that the verdict was clearly or overwhelmingly against the weight of the evidence. *Prebble v. Brodrick*, 535 F.2d 605, 617 (10th Cir. 1976). It would be an invasion of the province of the jury to grant a new trial merely because there was a sharp conflict in evidence, 6A Moores Federal Practice, Paragraph 59.80[5] (1986), which is exactly the case here. The evidence was sharply conflicting regarding all the issues that Liberty Group and Gurley address. It is not clearly or overwhelmingly in favor of either plaintiff or defendants and I will not disturb the jury's verdict.

2. *Excessive Damages as the Result of Passion or Prejudice*

Defendants also argue for a new trial or remittitur because the damages awarded were excessive as a result of passion or prejudice by the jury. Again, the evidence of damages was sharply conflicting. Defendants' and plaintiffs' experts each explained how they arrived at vastly different figures. The jury was instructed on the proper elements of damages for this case, and defendants are not claiming that the damage instructions were erroneous. Given the instructions, the jury accepted the calculations of plaintiffs' expert.

I find no evidence that the jury was motivated by passion or prejudice against the defendants. During deliberations, the jury sent a note that read, "Your Honor: Can Ron Ashcroft [the County Treasurer at the time of the transactions in question] be reprimanded as strongly as the law allows for his reprehensable [sic] handling of

county funds when we present our verdict?" In responses, I instructed the jury that "You should not report on the conduct of any of the parties or the witnesses." Contrary to defendants' position, the note from the jury does not demonstrate a predilection against defendants. The jury heard testimony from Mr. Ashcroft that could reasonably lead them to believe that Mr. Ashcroft failed to adequately monitor county accounts. The jury's opinion of Mr. Ashcroft, however, has no bearing on the defendants. The motion for a new trial or remittitur on these grounds is, therefore, denied.

3. *Untimely Jury Demand*

Defendants next argue that a new trial should be granted because it was error to permit a jury trial since plaintiffs' jury demand was untimely. This case was originally filed in State Court as a non-jury case in March 1988. In April 1988, the case was removed to this court and an answer and a Fed.R.Civ.P. 12(b)(6) motion were filed. A jury demand was filed on September 18, 1988. Defendants voiced no opposition to the jury demand as being untimely until August 15, 1990, five days before trial, in a letter to me. Prior to August 15, both parties proceeded to prepare this case as a jury trial. The parties prepared a stipulated pretrial order which acknowledged a jury trial and submitted jury instructions. A jury trial may be ordered with the consent of the parties. 9C Wright & Miller, Federal Practice and Procedures, Section 2333 (1971). "Consent for purposes of this rule need not be express. If one party demands a jury, the other parties do not object, and the court orders trial to a jury, this will be regarded as trial by consent." *Id.*; *see also Stockton v. Altman*, 432 F.2d 946 (5th Cir. 1970). Because of the untimely objection to plaintiffs' jury demand and the preparation of both parties for a jury trial, I deem defendants to have consented to a trial by jury. In any event, even if the jury demand was found to be a nullity, it would not constitute grounds

for a new trial. My findings and conclusions would issue from the trial already conducted. Defendants have not shown that any new or additional evidence would be needed in such circumstances. Defendants' motion for a new trial based on these grounds is, therefore, also denied.

4. *Erroneous Jury Instruction*

Lastly, defendants argue that new trial is required because of an erroneous jury instruction regarding scienter. Defendants objected to the portion of Instruction No. 24 that is underlined:

> The plaintiff in order to recover on his 10b-5 claim must show that the defendant acted knowingly, that is with a mental state embracing intent to deceive, manipulate, or defraud. In order to establish this element, the plaintiff must prove, by the greater weight of the evidence that the defendant made material statements which he knew to be false, or made statements with reckless disregard for their truth or falsity *or knew of the existence of material facts which were not disclosed and he should have realized their significance in the making of an investment decision* or knew of the existence of material facts which were not disclosed although he knew that knowledge of those facts would be necessary to make his other statements not misleading.

Defendants now object on the grounds that the instruction allowed the jury to find liability based on negligence and because it failed to define recklessness, an omission that defendants now claim is highly prejudicial. However, during objections to instructions at trial, defendants' objection was that "[t]he scienter element requires an intent to deceive, manipulate, or defraud . . . . [Y]ou have to show something more than this, which would be more of a simplest negligence standard instead of a gross negligence standard." Defendants did not ob-

ject to the omission of a recklessness definition at trial. No party can claim error in the failure to give an instruction unless he objects to it before the jury retires. Fed.R.Civ.P. 51 and *Zimmerman v. First Federal Savings & Loan Ass'n*, 848 F.2d 1047 (10th Cir. 1988). Therefore, defendants' objection to the omission of an instruction on recklessness is not well taken.

Regarding defendants' claim that the underlined language in Instruction was erroneous "[a] party who claims plain error has the heavy burden of demonstrating fundamental injustice. *Clegg v. Conk*, 507 F.2d 1351 (10th Cir. 1974) *cert. denied* 422 U.S. 1007 (1975). In *Clegg* the Tenth Circuit addressed the question of whether a jury instruction adequately informed the jury on the issue of scienter in a Rule 10b-5 claim. The Tenth Circuit found that

> If the trial court had charged the jury in effect that untrue statements or omissions resulting from mere negligence *without any manner of scienter, conscious fault, intention, or recklessness* would have been justified a recovery . . . this would have been fundamentally or palpably wrong and subject to correction . . . .
>
> But for the very reason that the language of the act tells us that such a charge would have represented a fundamental departure from its purpose and meaning, we believe that the use in the instructions of the language of the rule *implied that simple negligence would not be enough.* To use there is an undoubtable implication of fault beyond mere carelessness in "engaging in any device, scheme, or artifice to defraud or the making of untrue statements of material fact or omitting to state any material fact necessary in order to make statements made in light of the circumstances not misleading." Laymen in the context of the other instructions would be likely to sense this even though there is ground for

> dispute among lawyers that "untrue" statements and the "misleading" of others by omissions to state material facts could result simply from innocent, though negligent, oversight.

Id. at 1362 (citations omitted, emphasis added).

The reasoning of the Tenth Circuit is pertinent in this case. Instruction No. 24, read in its entirety, clearly conveys that scienter is required to find liability on a Rule 10b-5 claim. Defendants have not met their burden of showing fundamental injustice to require a new trial. Defendants' motion is, therefore, denied.

C. *Amendment of the Judgment*

Plaintiff move to amend the judgment entered on August 28, 1990 because it does not reflect the parties' pretrial stipulation that Liberty Capital Markets is the successor in interest to Liberty Group, that Liberty Capital Markets assumed all assets and liabilities of Liberty Group and because it does not provide for treble damages, which plaintiffs are entitled to under the RICO statute. Defendants move to amend the judgment so that it is in accordance with the jury's verdict regarding the remaining defendants in whose favor the jury found, and to dismiss with prejudice those counts that were not submitted to the jury. Defendants concede that if the jury verdict on the RICO count is allowed to stand, the defendants found liable for the RICO violation will be joint and severally liable for treble damages plus costs and reasonable attorney fees.

I find both plaintiffs' and defendants' arguments to be well taken and the judgment will be amended accordingly. The amended judgment will also reflect my decision to grant defendant Doyle Holmes' motion for JNOV.

IT IS SO ORDERED.

Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 88-414-M-Civil

BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY, NEW MEXICO and RON ASHCROFT, SAN JUAN COUNTY TREASURER, *Plaintiffs*,

v.

LIBERTY GROUP, a California Limited Partnership; LIBERTY PARTNERS, INC., a California Corporation; F.M.G. PARTNERS, a California General Partnership; LIBERTY CAPITAL MARKETS, INC., a California Corporation; PRUDENTIAL-BACHE SECURITIES, INC., a Delaware Corporation; CHESTER ARTHUR WALKER, JR.; DOYLE LAVERNE HOLMES; ROBERT CLAYTON HOLMES; STEVE RAY HOLMES; JAMES GRAHAM; and NORMAN ANDREW GURLEY, *Defendants*.

Defendants' Request for Civil Jury Instructions

REQUESTED JURY INSTRUCTION NO. 32.

["Knowingly," "Scienter" Explained]

As to the third element, the county, in order to recover on its 10b-5 claim, must show that the Liberty defendants acted knowingly, that is, with a mental state embracing intent to deceive or defraud. In order to establish this element the county must prove by a preponderance of the evidence that this defendant stated material facts which they knew to be false, or stated untrue facts with reckless disregard for their truth or falsity or knew of the existence of material facts which were not disclosed although he knew that knowledge of those facts would be necessary to make his other statements not misleading.

Recklessness means conduct which involves an extreme departure from the standard or ordinary care. A person acts in reckless disregard if the risk is known to him, or it is obvious that an ordinary person under the circumstances would have realized the danger and taken care to avert the harm likely to follow. A person may be reckless within the meaning of the law even though he thought himself to be careful. But recklessness in more than mere negligence. Reckless conduct represents grossly unreasonable, rash or intemerate behavior.

In the context of securities law, a person acts recklessly if he makes a false statement with a reckless disregard for whether it is true or false. It is not necessary for you to find that the defendant intended to injure the plaintiff, but that he acted in reckless disregard of a risk of whether there was truthful basis in his representations, or in the case of an omission, that he recklessly disregarded the material nature of those omissions.

The question of whether a person acted with intent to defraud or with reckless disregard is a question of fact for you to determine, like any other fact question. It is a question involving one's state of mind.

Direct proof of state of mind is almost never available, and is not required. Circumstantial evidence, if believed, is of no less value than direct evidence. In either case it is the county's burden to prove all of the elements by a preponderance of the Evidence.

Since an essential element of the county's case is intent to defraud of recklessness, it follows that good faith on the part of the defendant is a complete defense to a charge of securities fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the plaintiff to prove fraudulent intent and consequent lack of good faith by a preponderance of the evidence.

Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions*, Section 101.05; Sand, et al. *Modern Federal Jury Instructions*, Inst. No. 82-8.

APPENDIX D

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Section 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct

or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Section 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under sections 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-165 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State of local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957

(relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (c) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

(2) "States" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which oc-

curred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State of political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General

to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

FED. R. CIV. P.

Rule 51. Instructions to Jury: Objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.